QUESTIONS PRESENTED

1. Whether it was proper for the Court of Appeals to remand the cause to the District Court for proof of actual duress or entrapment, as against the petitioner's contention that her ignorance of the effect of voting in an election, coupled with statements of American officials in Germany urging eligible persons to vote, established entrapment as a matter of law.

2. Whether, within the meaning of Section 401 (e) of the Nationality Act of 1940, providing for loss of United States nationality by voting in a political election in a foreign state, the American zone of Germany was a foreign state in 1946.

3. Whether, within the meaning of Section 401 (e) of the Nationality Act of 1940, an election held in Germany under the auspices of American Military Government was a political election.

STATUTE INVOLVED

Section 401(e) of the Nationality Act of 1940, 54 Stat. 1137, 1168-1169, 8 U.S.C. 801(e) provides:

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * *
>
> (e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory * * *.

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STATEMENT

On February 2, 1950, in the United States District Court for the District of Columbia, petitioner filed a complaint under Section 503, Chapter V, of the Nationality Act of 1940, as amended, 8 U.S.C. 903, seeking a judgment declaring her to be a national of the United States. The pertinent facts as alleged in the complaint (R. 3-7) are as follows:

Petitioner (nee Hertha L. Wahl) was born in New York City in 1893. She lived with her parents in the United States from her birth until 1926, with the exception of brief summer vacation trips abroad. In October 1926, she married a German national in Munich, Germany, and thereafter lived in Germany with her husband. She stayed in Germany throughout World War II, and was there in 1945 when the American forces occupied Germany.

In 1946, American Military Government authorities and others announced that an election would be held to elect delegates from the American zone to consider and adopt a constitution for the establishment of a government for the American Zone of Germany. As a non-Nazi German national who had met the residence requirements, petitioner was eligible to vote. She makes no denial that, in fact, she actually voted in the election, which was held on June 30, 1946, but asserts that military government officials had urged that all those eligible to vote do so (particularly those opposed to Communism), and that she was unaware that voting in a foreign election had been made an act of expatriation by the Nationality Act of 1940.

In July 1947, petitioner made application for a United States passport which was denied on the grounds that she had expatriated herself by voting in the election of June 30, 1946. At that time she received a "Certificate of Expatriation." Petitioner subsequently obtained, on October 19, 1949, a "Temporary Travel Document in lieu of Passport for German nationals," valid until April 19, 1951. Upon arrival in the United States under this document, petitioner again took steps to assert her United States citizenship, but her claim was denied.

On May 18, 1950, the Government moved to dismiss this complaint on the ground that it failed to state any basis for relief (R. 8). On October 12, 1950, an order denying the Government's motion was entered (R. 13). Petitioner then made a motion for summary judgment which was granted (R. 14). On appeal by the Government, the Court of Appeals unanimously reversed the judgment of the District Court and remanded the cause for further proceedings consistent with its opinion. The District Court was instructed to permit petitioner to amend her complaint to develop if she can circumstances indicative of actual duress or entrapment. (R. 38.)

ARGUMENT

The judgment of the Court of Appeals is not a final judgment since petitioner was given an opportunity to amend her complaint and to allege and prove, if she can, actual duress or entrapment. Hence, at this stage of the proceedings, there is no

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necessity for a writ of certiorari to review the action of the Court of Appeals. *American Construction Co.* v. *Jacksonville, T. & K. W. Ry Co.*, 148 U.S. 372, 384; see Robertson & Kirkham, *Jurisdiction of the Supreme Court* (Wolfson & Kurland ed. 1951), Sec. 130, pp. 232-233.

It is clear, as the Court of Appeals held, that, unless she can show such actual duress and entrapment, the complaint presents no grounds for relief. Her claim that the facts as alleged in the pleadings and exhibits attached thereto are sufficient to establish that she never expatriated herself finds no support in the statute or the authorities.

The contentions which she makes in the setting of the German occupation are the same as those in the setting of the Japanese occupation which were rejected by the Court of Appeals for the Ninth Circuit in *Acheson* v. *Kuniyuki,* 189 F. 2d 741, certiorari denied, 342 U.S. 942.

1. Basically, her claim is that she did not know that, under the provisions of Section 401(e) of the Nationality Act, she would expatriate herself by voting in a foreign election. That is precisely the one consideration which, under the statute and decisions, is irrelevant. *Savorgnan* v. *United States,* 338 U.S. 491; *Mackenzie* v. *Hare,* 239 U.S. 299; *Acheson* v. *Kuniyuki, supra.*

The Nationality Act of 1940 enumerates overt acts, the voluntary performance of which results in loss of United States citizenship irrespective of the actor's awareness of their legal effect. In *Savor-*

gnan v. *United States*, 338 U.S. 491, this Court said, at pp. 499-500:[1]

> There is no suggestion in the statutory language that the effect of the specified overt acts, when voluntarily done, is conditioned upon the undisclosed intent of the person doing them.

Her claim that statements of American Military Government officials urging all eligible persons to vote, coupled with her ignorance of the consequences of voting, were sufficient as a matter of law to establish entrapment, is clearly without merit. Petitioner does not contend that she was compelled to vote against her will; she does not claim that anyone told her, before she voted, that her voting would not affect her citizenship. Her reliance on *Moser* v. *United States*, 341 U.S. 41, is thus misplaced. That case involved different statutory provisions and a totally different factual situation in that there the government officials, as well as Moser, were unclear as to the effect a claim of exemption from military service would have on his eligibility for citizenship and, indeed, Moser had

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[1] Petitioner makes the further argument that if the statute is interpreted so as to deprive her of her nationality on the basis of acts done without "notice of the consequences," the statute is unconstitutional. Nowhere in the opinion of this Court in the *Savorgnan* case was there any intimation that the fixing of objective conditions for loss of nationality was beyond the constitutional power of Congress. This Court has recently reaffirmed the power of Congress to establish objective acts of expatriation. In *Acheson* v. *Okimura*, 342 U. S. 899, and *Acheson* v. *Murata*, 342 U. S. 900, it vacated judgments holding 401(c) and (e) unconstitutional on the theory that Congress could not destroy citizenship by birth solely on the basis of the performance of specific acts.

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been specifically advised, through the Swiss Co
sulate, that he could claim exemption without bei
debarred. The Court of Appeals has given pe
tioner an opportunity to prove actual duress
entrapment, if she can. There is no occasion
consider the question now.

2. Petitioner's contention that the United Sta
Zone of Occupied Germany is not a foreign st
within the meaning of the Nationality Act of 19
8 U.S.C. 801(e) is without merit. This Court h
held that countries occupied by United Sta
forces following a military victory continued to
"foreign," although United States domination a
control were at least as complete as they were w
respect to Germany following World War I
Neely v. *Henkel* (No. 1), 180 U.S. 109, 115-11
Fleming v. *Page*, 9 How. 603, 614. These decisi
rest on the well-established principle of interna
tional law that conquest and occupation alone
not effect the transfer of sovereignty. The v
torious power assumes authority required to ma
tain law and order, but the two states are
merged merely by the fact of military occupati
See Par. 273, Rules of Land Warfare of the W
Department of the United States, quoted in
Hackworth, *Digest of International Law*, § 5
p. 385 (1943); Hyde, *International Law*, Vol.

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[2] Thus this Court said with respect to one of the occupati
"The Mexican authorities had been driven out, or had
mitted to our army and navy; and the country was in
exclusive and firm possession of the United States, and gover
by its military authorities * * *." *Fleming* v. *Page*, su
p. 614.

§ 106 (1922); and Oppenheim, *International Law*, Vol. II, § 166 (6th ed., 1944).

Allied occupation of Germany after World War II had as its objective, not immediate or eventual annexation of Germany, but the rehabilitation of German political life. The quadripartite declaration announcing allied assumption of authority did "not effect the annexation of Germany."[3] The State Department, in reporting on the German occupation for 1945-46, stressed the efforts being made to restore German self-government on a democratic basis, noting that "[a] year after Potsdam (September 6, 1946) Secretary Byrnes advocated 'the early establishment of a provisional German government for Germany.'"[4] Thus, it is clear that German sovereignty has been preserved during the period of Allied occupation.

Petitioner cites *Brehm* v. *Acheson*, 90 F. Supp. 662 (S.D. Tex.) and *In re Riedner*, 94 F. Supp. 289 (E.D. Wis.), holding that, contrary to the views of authoritative international law treatises and of this Court, occupied Germany is not a foreign state. Those cases, and others holding similarly with respect to occupied Japan,[5] cannot be regarded as good law. More recent District Court cases have

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[3] Occupation of Germany, Policy and Progress, 1945-1946, Department of State Publication 2783, Plaintiff's Exhibit E (R. 24).

[4] *Ibid.*, 19.

[5] *Yamamoto* v. *Acheson*, 93 F. Supp. 346 (D. Ariz.); *Arikawa* v. *Acheson*, 83 F. Supp. 473 (S.D. Calif.); *Furuno* v. *Acheson*, 94 F. Supp. 381 (S.D. Calif.).

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held occupied Japan to be a foreign state,[6] and these were followed in *Acheson* v. *Kuniyuki*, 189 F. 2d 741 (C.A. 9), certiorari denied, 342 U.S. 942, the only Court of Appeals decision (prior to the instant case) involving the question of the status of occupied countries for the purpose of Section 401(e).

There is a real question, moreover, whether petitioner's contention that Germany was not a state is justiciable at all. This Court has long recognized that "Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government." *Jones* v. *United States*, 137 U.S. 202, 212, and cases there cited. Hence, it may very well be conclusive here that the Department of State deems occupied Germany to be a "foreign state."[7]

3. The election of June 30, 1946, was a "political election" within the meaning of Section 401(e) of the Nationality Act of 1940. Voting in a foreign

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[6] *Kuwahara* v. *Acheson*, 96 F. Supp. 38 (S.D. Calif.); *Uyeno* v. *Acheson*, 96 F. Supp. 510 (W.D. Wash.). The "foreignness" of occupied territory has been recognized without question in cases arising under the Federal Tort Claims Act which prohibits actions against the United States based on claims arising in a foreign country. *Brewer* v. *United States*, 79 F. Supp. 405 (N.D. Calif.) (Okinawa); *Brunell* v. *United States*, 77 F. Supp. 68 (S.D. N.Y.) (Saipan).

[7] See Defendant's Exhibit 2, R. 9, a letter from the Legal Adviser of the State Department which refers to the "position of this Government that Germany did not pass out of existence as a state by virtue of the unconditional surrender and disappearance of the central government of that country."

election was made an act of expatriation because "an American national should" not "be permitted to participate in the political affairs of a foreign state and at the same time retain his American nationality."[8] The crucial word is "political," which is defined as follows:

> 1: Of or pertaining to polity, or polities, or the conduct of government, referring in the widest application to the judicial, executive and legislative branches; of or pertaining to or incidental to, the exercise of the functions vested in those charged with the conduct of government; relating to the management of affairs of state; * * *.[9]

It is incontrovertible that the process of adopting a constitution is "political" in the sense of pertaining to "the conduct of government" or "relating to the management of affairs of state." The significance for this process of the election in which petitioner voted is clearly brought out in the State Department publication, Occupation of Germany: Policy and Progress, 1945-1946[10]:

> (c) Constitutions. The United States has also taken the initiative in seeking to restore a constitutional basis for the political life of Germany. In each *Land* of the U.S. zone con-

[8] Hearings before House Committee on Immigration and Naturalization on H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st sess., pp. 405, 490-491.

[9] Webster's New International Dictionary of the English Language (2d ed., unabridged, 1948).

[10] Reprinted as Plaintiff's Exhibit E, R. 16, at R. 22-23

stitutional assemblies, chosen by popular election on June 30, 1946, convened during the summer and drew up state constitutions on the basis of initial drafts prepared by special committees appointed by the three ministers-president. Vigorous controversy centered around such issues as the nature and powers of the executive, the existence and composition of a second chamber, religious influence in the schools, and the socialization of key industries. Military government gave a free hand to the assemblies except to prescribe that the documents insure democratic processes, the safeguarding of civil rights, and the supremacy of law. The three constitutions, as finally drafted by the assemblies and approved in October by OMGUS, embody the customary German pattern of parliamentary government through ministers-president subject to popular diets. Special stress is placed on guarantees of civil liberties, an independent judiciary, and popular checks both on administration and legislation.

The constitutions were presented to the electorates on November 24 and December 1, 1946. In all three *Länder* they were approved by substantial majorities. * * * As of January 1, 1947, the governments of the three *Länder* of the U.S. zone have rested upon a basis of democratic control through the mechanism of cabinets responsible to popularly elected diets and the role of military government in internal German affairs has been reduced to a minimum.

In view of the concrete achievement of the constitutional assembly elected in the election of June 30, 1946, that election cannot be said to have been a mere "straw vote or opinion poll or exercise in democracy" as petitioner contends (Pet. 16). Rather, as a vital step in the reestablishment of German self-government, it was the kind of foreign political activity participation in which Congress deemed inconsistent with American nationality.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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